

STATE BAR COURT OF CALIFORNIA
HEARING DEPARTMENT – SAN FRANCISCO

In the Matter of)	Case Nos.: 04-O-10156 ; 04-O-13227
)	(04-O-15425; 05-O-00597;
)	06-O-11170); 04-O-15145
SCOTT SMITH FURSTMAN,)	(Cons.)
)	
)	DECISION AND ORDER SEALING
Member No. 76476,)	CERTAIN DOCUMENTS
)	
)	
<u>A Member of the State Bar.</u>)	

INTRODUCTION

In this consolidated original disciplinary proceeding, respondent Scott Smith Furstman (respondent) was accepted for participation in the State Bar Court’s Alternative Discipline Program (ADP).¹ As the court has now terminated respondent from the ADP, the court will recommend to the Supreme Court that respondent be suspended from the practice of law in California for one (1) year, that execution of that period of suspension be stayed, and that he be placed on probation for two (2) years subject to certain conditions, including a nine (9) month period of suspension.

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¹ The ADP was formerly known as the Program for Respondents with Substance Abuse or Mental Health Issues.

PERTINENT PROCEDURAL HISTORY

Prior to formal disciplinary charges being filed, respondent contacted the State Bar's Lawyer Assistance Program (LAP) on November 29, 2004, for assistance with his mental health issue.

The State Bar of California, Office of the Chief Trial Counsel (State Bar) filed a Notice of Disciplinary Charges (NDC) against respondent on December 3, 2004, in case no. 04-O-10156. The matter was originally assigned to the Honorable Richard A. Honn.

On December 14, 2004, Judge Honn referred this matter to the State Bar Court's ADP before the undersigned judge in San Francisco for evaluation of respondent's eligibility for participation in the State Bar Court's ADP. The undersigned filed an order on December 27, 2004, reassigning this case to the undersigned for all further proceedings.

In furtherance of his participation in the ADP, respondent signed a long-term Participation Plan with the LAP in early April 2005.

The State Bar filed a NDC against respondent in case no. 04-O-15145 on May 10, 2005.

Respondent submitted a declaration to the court on December 5, 2005, which established a nexus between respondent's mental health issue and his misconduct in these matters.

On May 2, 2006, the court filed an order consolidating case no. 04-O-10156 and case no. 04-O-15145.

The parties entered into a Stipulation Re Facts and Conclusions of Law (Stipulation) in case nos. 04-O-10156; 04-O-13227 (04-O-15425; 05-O-00597; 06-O-11170); 04-O-15145 on August 7, 2006. The Stipulation sets forth the factual findings, legal conclusions and mitigating and aggravating circumstances in this matter. The Stipulation was received by the court on August 7, 2006.

Thereafter, the court advised the parties of (1) the discipline which would be recommended to the Supreme Court if respondent successfully completed the ADP and (2) the discipline which would be recommended if respondent failed to successfully complete, or was terminated from, the ADP. After agreeing to those alternative possible dispositions, respondent executed the Contract and Waiver for Participation in the State Bar Court's ADP; the court executed a Confidential Statement of Alternative Dispositions and Orders (Confidential Statement) formally advising the parties in writing of the alternative discipline recommendations in this matter; the court accepted respondent for participation in the ADP; and respondent's period of participation in the ADP began on October 31, 2006.²

Respondent thereafter participated in both the LAP and the State Bar Court's ADP. However, on May 4, 2010, the State Bar filed a request for the issuance of an Order to Show Cause (OSC) requiring respondent to show cause as to why he should not be terminated from the ADP. Respondent filed a response on August 30, 2010, to the State Bar's request for an OSC, stating that respondent did not object to the State Bar's request for an OSC and agreeing to terminate his participation in the ADP. Thereafter, the court filed an order on August 31, 2010, terminating respondent from the ADP. Upon respondent's termination from the ADP, the court filed the parties' Stipulation in this matter.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The parties' Stipulation, including the court's order approving the Stipulation, is attached hereto and hereby incorporated by reference, as if fully set forth herein.

In case no. 04-O-10156, respondent stipulated that he: (1) failed to perform legal services competently by repeatedly failing to prosecute an appeal in violation of rule 3-110(A) of

² The parties' Stipulation, the Confidential Statement, and the ADP Contract were all lodged on October 31, 2006.

the Rules of Professional Conduct of the State Bar of California;³ (2) willfully failed to comply with court orders in violation of Business and Professions Code section 6103;⁴ and (3) failed to adequately communicate with his client in violation of section 6068, subdivision (m).

Respondent stipulated in case no. 04-O-13227 to: (1) failing to perform legal services competently by repeatedly failing to file an opening brief on his client's behalf in violation of rule 3-110(A); and (2) willfully failing to comply with court orders in violation of section 6103.

In case no. 04-O-15145, respondent stipulated that he: (1) violated rule 3-700(A)(2) by withdrawing from employment in a proceeding pending before a tribunal without obtaining permission from the tribunal; and (2) willfully failed to obey court orders in violation of section 6103.

In case no. 04-O-15425, respondent stipulated that he: (1) violated rule 3-700(A)(2) by withdrawing from employment in a proceeding pending before a tribunal without obtaining permission from the tribunal; and (2) willfully failed to obey a court order in violation of section 6103.

Respondent stipulated in case no. 05-O-00597 that he failed to return unearned fees to a client in violation of rule 3-700(D)(2).

In case no. 06-O-11170, respondent stipulated that he: (1) failed to perform legal services competently by repeatedly failing to respond in a complete and timely manner to discovery in violation of rule 3-110(A); and (2) failed to adequately communicate with a client in violation of section 6068, subdivision (m).

³ Unless otherwise indicated, all further references to rule(s) refer to the Rules of Professional Conduct of the State Bar of California.

⁴ Unless otherwise indicated, all further references to section(s) refer to provisions of the Business and Professions Code.

In mitigation, respondent has no prior disciplinary record. Respondent practiced law for over twenty-four years prior to the commencement of the misconduct in this matter.⁵ (Rules Proc. of State Bar, tit. IV, Stds. for Atty. Sanctions for Prof. Misconduct, std. 1.2(b)(i).)⁶ The parties also stipulated that respondent, through his counsel, was cooperative and candid with the State Bar in resolving this matter. (Std. 1.2(e)(v).) Furthermore, between 1996 and 2004, respondent suffered financial and emotional distress as a result of commuting between his family home in northern California and his law practice in southern California. In addition, respondent's mother developed dementia; respondent's sister was diagnosed with cancer; and his father died during this time. (Std. 1.2(e)(iv).) Furthermore, respondent paid the sanctions ordered by the court and returned a client's motorcycle, which had been transferred to him for attorney fees, albeit after the State Bar's intervention.⁷ In addition, as a demonstration of good faith and remorse, respondent agreed to refund advanced attorneys fees to two clients. (Std. 1.2(e)(vii).) Respondent also waived attorney fees and costs in another matter. However, as respondent did not successfully complete the ADP, he will not receive mitigating credit for his period of participation in either the ADP or the LAP.⁸

In aggravation, respondent engaged in multiple acts of misconduct toward multiple clients. (Std. 1.2(b)(ii).)

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⁵ Although the parties stipulated that respondent had been admitted to practice law for ten years at the time of this misconduct, this appears in error, as respondent was admitted to the practice of law in this state on December 21, 1977, and the earliest misconduct occurred sometime after February 2, 2002.

⁶ All further references to standard(s) or std. are to this source.

⁷ As the sanctions were paid and the motorcycle returned after the State Bar's intervention, such acts are only given limited weight in mitigation.

⁸ Although the parties stipulated that respondent's participation in the LAP was an additional mitigating circumstance, the court gives this no weight in mitigation as respondent's participation in the ADP was terminated.

DISCUSSION

The purpose of State Bar disciplinary proceedings is not to punish the attorney but, rather, to protect the public, preserve public confidence in the legal profession, and maintain the highest possible professional standards for attorneys. (*Chadwick v. State Bar* (1989) 49 Cal.3d 103, 111.)

In determining the appropriate alternative discipline recommendations if respondent successfully completed the ADP or was terminated from, or failed to successfully complete, the ADP, the court considered certain standards and case law. In particular, the court considered standards 1.2, 1.3, 1.4, 1.5, 1.6, 2.4(b), 2.6 and 2.10 and *Young v. State Bar* (1990) 50 Cal.3d 1204.

Because respondent has now been terminated from the ADP, this court, in turn, now recommends to the Supreme Court the imposition of the higher level of discipline, set forth more fully below.

DISCIPLINE

Recommended Discipline

It is hereby recommended that respondent **Scott Smith Furstman**, State Bar Number 76476, be suspended from the practice of law in California for one (1) year, that execution of that period of suspension be stayed, and that he be placed on probation⁹ for a period of two (2) years subject to the following conditions:

1. Respondent Scott Smith Furstman is suspended from the practice of law for the first nine (9) months of probation.
2. Respondent Scott Smith Furstman must also comply with the following additional conditions of probation:

⁹ The probation period will commence on the effective date of the Supreme Court order imposing discipline in this matter. (See Cal. Rules of Court, rule 9.18.)

- a. During the probation period, respondent must comply with the provisions of the State Bar Act and the Rules of Professional Conduct of the State Bar of California;
- b. Within ten (10) days of any change, respondent must report to the Membership Records Office of the State Bar and to the Office of Probation of the State Bar of California (Office of Probation), all changes of information, including current office address and telephone number, or other address for State Bar purposes, as prescribed by section 6002.1 of the Business and Professions Code;
- c. Within thirty (30) days after the effective date of discipline, respondent must contact the Office of Probation and schedule a meeting with respondent's assigned probation deputy to discuss these terms and conditions of probation. Upon the direction of the Office of Probation, respondent must meet with the probation deputy either in person or by telephone. During the period of probation, respondent must promptly meet with the probation deputy as directed and upon request;
- d. Respondent must submit written quarterly reports to the Office of Probation on each January 10, April 10, July 10 and October 10 of the period of probation. Under penalty of perjury, respondent must state whether respondent has complied with the State Bar Act, the Rules of Professional Conduct, and all conditions of probation during the preceding calendar quarter. Respondent must also state whether there are any proceedings pending against him in the State Bar Court and if so, the case number and current status of that proceeding. If the first report would cover less than thirty (30) days, that report must be submitted on the next quarter date, and cover the extended period.

In addition to all quarterly reports, a final report, containing the same information, is due no earlier than twenty (20) days before the last day of the period of probation and no later than the last day of the probation period;

- e. Subject to the assertion of applicable privileges, respondent must answer fully, promptly and truthfully any inquiries of the Office of Probation which are directed to respondent personally or in writing relating to whether respondent is complying or has complied with the probation conditions;
- f. Within one (1) year of the effective date of the discipline herein, respondent must provide to the Office of Probation satisfactory proof of attendance at a session of the State Bar Ethics School, and passage of the test given at the end of that session;
- g. Respondent must obtain psychiatric or psychological help/treatment from a duly licensed psychiatrist, psychologist, or clinical social worker at

respondent's own expense a minimum of two (2) times per month and must furnish evidence to the Office of Probation that respondent is so complying with each quarterly report. Help/treatment should commence immediately, and in any event, no later than thirty (30) days after the effective date of the discipline in this matter. Treatment must continue for two years or until a motion to modify this condition is granted and that ruling becomes final.

If the treating psychiatrist, psychologist, or clinical social worker determines that there has been a substantial change in respondent's condition, respondent or the Office of the Chief Trial Counsel may file a motion for modification of this condition with the Hearing Department of the State Bar Court, pursuant to rule 550 of the Rules of Procedure of the State Bar of California. The motion must be supported by a written statement from the psychiatrist, psychologist, or clinical social worker, by affidavit or under penalty of perjury, in support of the proposed modification; and

- h. Respondent must pay restitution (including the principal amount, plus interest of 10% per annum) to the payee(s) listed below. If the Client Security Fund (CSF) has reimbursed one or more of the payee(s) for all or any portion of the principal amount(s) listed below, respondent must also pay restitution to CSF in the amount(s) paid, plus applicable interest and costs.

<u>Payee</u>	<u>Principal Amount</u>	<u>Interest Accrues From</u>
Lawrence Jou	\$10,000	April 1, 2004
Bong Yul Shin	\$ 5,000	January 1, 2005

Respondent must pay the above-referenced restitution on the payment schedule set forth below. Payment must be postmarked on or before the 1st day of each month commencing the month after the effective date of the Supreme Court order imposing discipline in this matter. Respondent must provide satisfactory proof of payment to the Office of Probation with each quarterly probation report, or as otherwise directed by the Office of Probation. No later than thirty (30) days prior to the expiration of the period of probation, respondent must make any necessary final payment(s) in order to complete the payment of restitution, including interest, in full.

<u>Payee/CSF (as applicable)</u>	<u>Minimum Payment Amount</u>
Lawrence Jou	\$150.00
Bong Yul Shin	\$100.00

To the extent that respondent has paid any restitution prior to the effective date of the Supreme Court's order imposing discipline in this proceeding, respondent will be given credit for such payment(s) provided satisfactory proof of such is, or has been, shown to the Office of Probation.

3. At the expiration of the period of probation, if Scott Smith Furstman has complied with all conditions of probation, the one (1) year period of stayed suspension will be satisfied and that suspension will be terminated.

Multistate Professional Responsibility Examination

It is further recommended that Richard Aker Friedling be ordered to take and pass the Multistate Professional Responsibility Examination (MPRE) within one year after the effective date of the Supreme Court's disciplinary order in this matter and provide satisfactory proof of such passage to the State Bar's Office of Probation in Los Angeles within the same period. Failure to do so may result in an automatic suspension. (Cal. Rules of Court, rule 9.10(b).)

Rule 9.20, California Rules of Court¹⁰

It is further recommended that respondent Scott Smith Furstman be ordered to comply with the requirements of rule 9.20 of the California Rules of Court, and perform the acts specified in subdivisions (a) and (c) of that rule within thirty (30) and forty (40) calendar days, respectively, after the effective date of the Supreme Court's final disciplinary order in this matter.

Costs

It is recommended that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10, and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

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¹⁰ Rule 9.20 was formerly numbered rule 955.

DIRECTION RE DECISION AND ORDER SEALING CERTAIN DOCUMENTS

The court directs a court case administrator to file this Decision and Order Sealing Certain Documents. Thereafter, pursuant to rule 806(c) of the Rules of Procedure of the State Bar of California (Rules of Procedure), all other documents not previously filed in this matter are ordered sealed pursuant to rule 23 of the Rules of Procedure.

It is further ordered that protected and sealed material will only be disclosed to: (1) parties to the proceeding and counsel; (2) personnel of the Supreme Court, the State Bar Court and independent audiotape transcribers; and (3) personnel of the Office of Probation when necessary for their duties. Protected material will be marked and maintained by all authorized individuals in a manner calculated to prevent improper disclosures. All persons to whom protected material is disclosed will be given a copy of this order sealing the documents by the person making the disclosure.

IT IS SO ORDERED.

Dated: March _____, 2011

PAT McELROY
Judge of the State Bar Court